

1989 OHA Blueprint

4. Submerged Lands and Offshore Waters

Native Hawaiians have an interest in the living and nonliving resources of submerged lands and offshore water in the exclusive economic zones and territorial seas surrounding the Hawaiian Islands, Johnston Atoll, Palmyra Island, and Midway Island. Native Hawaiians are entitled to half of all revenues received by the U.S. government from these resources. Native Hawaiians are also entitled to harvest half of all resources in these areas. Both the living and nonliving resources should be co-managed by appropriate federal and state agencies, and OHA or any successor Native Hawaiian entity developed pursuant to the process set forth below, in an environmentally sensitive manner designed to preserve these resources for future generations.

Konohiki Fishing Rights

* During the Kingdom of Hawai`i, *konohiki* managed the fishing areas between the beach and the reef.

* After annexation, these areas were recognized as private property rights – *Damon v. Hawai`i*, 194 U.S. 154 (1904).

* But Congress acted to dismantle this system in the 1900 Organic Act, requiring owners to file their claims within two years.

* 101 *konohiki* fisheries were registered by 35 owners, mostly non-Hawaiians or estates.

* Was it constitutional to destroy the private rights in the coastal fisheries? Was the registration requirement in the Organic Act an unconstitutional *taking* in violation of the Fifth Amendment?

* Do the Native Hawaiians continue to have rights in the coastal fisheries under Article XII, Section 7 of the Hawai`i Constitution?

* When do indigenous peoples have an *entitlement to maritime resources* based on prior use or heritage?

* What *legal arguments* have been or could be mustered to support and/or negate this concept?

* What has been the state and indigenous peoples' experiences in regard to maritime claims?

* What are the commonalities and differences in these experiences?

* *What lessons may be transferable from one situation to another?*

* What lessons regarding *environmental stewardship* can Western cultures learn from the practices of indigenous peoples?

* What is the impact of viewing *maritime resources as private in nature (i.e., limited transferable access rights)* rather than public (open access)?

This project will compare traditional (communal) and modern (scientific) approaches to the management of oceans and inland waters, as well as the classical (statist) and post-classical (multi-level) approaches to conflict management in international affairs.

The project will think through the *law reform requirements* and opportunities both at national and international levels of legal development.

The project is expected to produce the following *practical benefits*:

(i) a full understanding of *environmental management strategies* utilized traditionally and presently by the native peoples of the Pacific and Arctic;

(ii) a comparison and understanding of the historical maritime activities and current claims of the native peoples of the Pacific and Arctic, examining *legal successes as well as setbacks*, and creating an opportunity for mutual understanding and conciliation between contending claimants and respondents;

(iii) an examination of the positive and negative impacts of the *privatization* of maritime resources through *limited-entry* and transferrable quota systems, especially in relation to the claims and activities of native peoples; and

(iv) the examination and development of *new ideas* for strategies, public policy, and perhaps legislation, in this important and contentious field.

Maori Fisheries Act of 1989

* 10% of all quota, based on the total allowable commercial catch (TACC) for each major commercial species, to be given to Maori iwi (tribes) over four years, along with a payment of NZ \$10 million.

* These assets grew to comprise a quota of 60,252 tons (dependent on TACC for each year), all shares in Te Ohu Kai Moana Ltd, which owns 68% of Moana Pacific Fisheries Ltd, and an 18.6% share in Te Kupenga Ltd which owns the other 32% of Moana Pacific, and approximately NZ \$50 million in cash (for a total estimated market value as of September 30, 1999 of about *NZ \$350 million*).

1992 Treaty of Waitangi (Fisheries Claims) Settlement Act

* Recognized the Maori's exclusive rights to traditional fishing grounds and a developmental right in deepwater fisheries.

* The commercial aspect of the settlement

(a) recognized Maori rights to 20% of any TACC for any additional species introduced under the Management System since 1992;

(b) provided funding to purchase a 50% share of Sealord Products Ltd, amounting to NZ \$350 million (in 1992, Sealord held 27% by volume of the New Zealand quota resource);

(c) conveyed NZ \$18 million in cash; and

(d) established the Treaty of Waitangi Fisheries Commission, known as Te Ohu Kai Moana (TOKM).

Pacific Northwest Native Americans

Each treaty contained a provision securing to the natives certain off-reservation fishing rights:

“The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory.....”

But as the nonnative population grew dramatically, it was unclear what rights this language actually secured – ***the right to compete for fish with the nonnatives or the right to a secure portion of the fish catch.***

In a landmark decision in 1974, U.S. District Judge ***George Boldt*** interpreted the right to take fish “in common with all citizens of the territory” to mean that treaty Indians and nonnative residents of Washington were each entitled to ***a 50-50 share of the total harvestable catch***, and that the tribes’ 50% share encompassed ***commercial as well as personal uses.*** *United States v. Washington*, 384 F.Supp. 312 (D.Wash.1974).

Pacific Northwest Native Americans

The Northwest natives have won similar judicial battles regarding the harvesting of shellfish in the Puget Sound area. One example is the Tulalip Tribe case regarding Hat Island. Despite centuries of sacred ceremonial and subsistence harvesting on the island, the tribe was prevented from digging clams in 1989 by a group of property owners who contended the natives were trespassing on the private island. Building on the Boldt Decision, the U.S. Court of Appeals for the Ninth Circuit ruled in 1998 that *the right to take fish in common with other citizens included a right to take shellfish as well. United States v. Washington, 157 F.3d 630 (9th Cir. 1998), cert. denied (1998).*

The tribes now have a right to take 50% of every species of shellfish found anywhere within the tribes' usual and accustomed fishing areas, and are not limited to only those species actually harvested prior to signing of the treaties.

Alaska Natives.

* Inuit, Y'upik and Inupiat Eskimo, Aleut, Athabaskan, Tlingit, Haida and Tsimshian.

* The 1884 Organic Act recognized the unique position of Alaska Natives.

***1971 Alaska Native Claims Settlement Act (ANSCA)** -- Congress confirmed title to 44 million acres in 13 Regional Native Corporations and over 200 Native Village Corporations, along with a monetary settlement of \$962.5 million, but it also extinguished Alaska Native aboriginal claims to the land, including submerged land, and extinguished aboriginal hunting and fishing rights.

* Unlike the Maori who have specific rights to the New Zealand fisheries, the Alaska natives only have the rights to compete with others under a corporate model. Their greatest fear was that the new corporate structure embraced by ANSCA might one day become the means of their own destruction.

Ainu (Japan).

- * Inhabiting Hokkaido, Sakhalin, the Kuriles, and the Russian Far East.

- * Their traditional villages were typically located along rivers and their staple food was salmon.

- * In 1873, the use of uray nets was prohibited for salmon fishing.

- * By 1878, fishing for salmon and trout was banned completely in the Sapporo district, and subsistence fishing was prohibited in 1897.

- * The indigenous status of the Ainu was finally recognized in 1997 in the landmark Nibutani Dam Decision.

- * In its ruling, the court recognized the Ainu's rights as indigenous peoples under both the Constitution of Japan and the International Covenant on Civil and Political Rights (ICCPR).

- * A day after the decision, Japanese Prime Minister Ryutaro Hashimoto acknowledged for the first time as a "historical fact" that the Ainu minority are indigenous people.

Indigenous Ethics Regarding Maritime Resources.

The project would be designed to facilitate communication among the native communities, but it would also be designed *to explore the unique concepts of environmental relationships and stewardship that guide native approaches to resource management.*

* In 1992, the United Nations Conference on Environment and Development in Rio de Janeiro, recognized the vital role of indigenous communities in environmental management “because of their knowledge and traditional practices.”

* The Inuit Circumpolar Conference (ICC) has identified traditional indigenous knowledge as, “a way of life, based on the experience of the individual and of the community, as well as knowledge passed down from one’s elders and incorporated in indigenous languages.”

Indigenous Ethics Regarding Maritime Resources.

* The most common native perspective is that all peoples and all life forms are members of an extended family.

* This indigenous world view gives rise to a relational, rather than a hierarchical, ethic.

* The Maori people's perspective on ocean resources is predicated on four basic principles:

** First, the sea is part of a global environment in which all parts are interlinked.

** Second, the sea, as one of the taonga, or treasures of Mother Earth, must be nurtured and protected.

** Third, the protected sea is a koha, or gift, which humans may use.

** Fourth, the use is to be controlled in a way that will sustain its bounty.

Indigenous Ethics Regarding Maritime Resources.

In Albuquerque, the EPA approved the Isleta Pueblo's water quality standards under the Clean Water Act (CWA). The Pueblo sought to protect the ceremonial use of its water as well as fishery, recreational, and other "standard" water uses. The Pueblo standards were more stringent than the typical "fishable/swimmable" goal that the CWA would have required. The District Court approved the EPA's approval of the Pueblo water quality standards upon a challenge by the City of Albuquerque. *City of Albuquerque v. Browner*, 865 F. Supp. 733 (D.N.M.1993).

- * Native peoples focus on "*sustainability*" of their resources, and emphasize the future more than other cultures.

- * The Iroquois emphasize this approach distinctly when they ask, with regard to every decision, whether this action be of benefit to the *seventh generation* that will follow in the future.

Examples of Indigenous Claimants

- * The Ainu and the Ryukuans (Okinawans) in Japan

- * The nine tribes of aboriginal people in Taiwan

- * The Aborigines and Torres Strait Islanders of Australia

- * The Maori of New Zealand (Aotearoa).

- * The Kanaks of New Caledonia

- * The Kanaka of Tahiti

- * Native Hawaiians (Kanaka Maoli)

- * Native Fijians

- * Native Americans of the U.S. Northwest

- * The Haida and other tribes in British Columbia

- * The Inuit in Arctic Regions, Aleuts, and the other Native Alaskans

At the conference that created the 1982 United Nations Law of the Sea Convention, no thought was given to the special claims and entitlements of indigenous minorities.

With the establishment and development of various new regimes of coastal state jurisdiction, many coastal states are now faced with *the need to accommodate indigenous entitlement*, inside or outside the statist framework of international law.

Just as the concept of *the common heritage of humankind* as applied to distant areas of the seabed was designed in part to redress inequities among nations, the newly-gained national authority in offshore areas should be used in part *to redress inequities within nations*, particularly among the indigenous poor.